Dominion Sprinkler Services, Inc. *and* Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO. Cases 5–CA–24584 and 5–CA–24739

October 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issue presented for Board review is whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off, discharging, and refusing to consider persons for employment because of their union membership.[1] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions,[4] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dominion Sprinkler Services, Inc., Chantilly, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On August 25, 1995, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent's request for oral argument is denied as the record and briefs adequately present the issues and positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that there are no exceptions to the judge's findings that the Respondent committed several violations of Sec. 8(a)(5) or to his recommended dismissal of the allegation that the Respondent unlawfully laid-off employee Howard Hux.

[4] We find that the judge's analysis of the 8(a)(3) violations is consistent with the test of unlawful motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In sum, the judge has found a prima facie case of discriminatory conduct and has considered and rejected as pretextual the Respondent's proffered defenses of legitimate motivation. See *T&J Trucking Co.*, 316 NLRB 771, 771–772 (1995); *Garney Morris, Inc.*, 313 NLRB 101, 102 (1993); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

Dean Lawrence Burrell, Esq., for the General Counsel.

Eric A. Anderson, Esq. (Haas & Dennis, P.C.), of McLean, Virginia, for the Respondent.

James F. Dabbondanza, of Columbia, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On charges filed by Road Sprinkler Fitters Local Union No. 669 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO[1] (the Union), it is alleged by the National Labor Relations Board (the Board) that Dominion Sprinkler Services, Inc.[2] (Respondent) collectively violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, by laying off and/or discharging David Hall, Harlan Martin, and Howard Hux, by refusing to consider Edward Saunders and Jack Downey for employment, by failing to pay fringe benefit contributions to specified trust funds, by failing to remit dues to the Union, by failing to make fringe benefit contributions for unit employees, by failing and refusing to bargain with the Union, and by refusing to furnish the Union with information it requested. Respondent denies violating the Act.

A hearing was held on these consolidated cases on June 14 and 15, 1995, in Washington, D.C. A brief was filed by the General Counsel on August 10, 1995. Respondent did not file a brief.[3] On the entire record in this proceeding including my observation of the witnesses and their demeanor, and after considering the aforementioned brief, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Virginia corporation, is engaged as a construction contractor performing services related to the installation, maintenance, and servicing of sprinkler systems. It is alleged, the Respondent admits, and I find that at all times material, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] Hereafter referred to as the Union or Charging Party.

[2] Hereafter referred to as Respondent, Employer, or Company.

[3] After this decision was written, Respondent submitted a brief for filing. Originally I gave July 28, 1995, as the date on which briefs must be filed. Subsequently, it appears that Chief Judge Davidson, in response to a request, extended the filing date to August 10, 1995. See Appendix A (omitted from publication). Since Respondent's brief, which was stamped ''RECEIVED AUG 17 2[:]25 PM '95, NATIONAL LABOR RELATIONS BOARD ORDER SECTION'' and ''DIVISION OF JUDGES Aug 18 2[:]53 PM '95, NLRB, Washington, D.C.,'' was not filed on time and since Respondent has not provided any justification for accepting the late-filed pleading, notwithstanding the certification of when a copy was hand-delivered to counsel for General Counsel, Respondent's brief, which was mailed August 15, 1995, will not be included here. It should be noted that I have read the brief and even if the brief were considered, it would not warrant, in my opinion, changing the findings of fact and conclusions of law here.

II. ALLEGED UNFAIR LABOR PRACTICES

By document dated November 23, 1987, General Counsel's Exhibit 3, Respondent unconditionally acknowledged and confirmed that the Union ''is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the . . . Act.''

By an ''ASSENT AND INTERIM AGREEMENT'' dated February 16, 1988, General Counsel's Exhibit 4, Respondent agreed to be bound by the terms and conditions of the collective-bargaining agreement that was negotiated between the National Fire Sprinklers Association, Inc. (Association or NFSA) and the Union. The agreement between the Association and the Union effective between April 1, 1985, and March 31, 1988, was received as General Counsel's Exhibit 6. And the agreement between the Association and the Union from April 1, 1988, to March 31, 1991, was received as General Counsel's Exhibit 7.

A similar ''ASSENT AND INTERIM AGREEMENT'' dated January 14, 1991, General Counsel's Exhibit 5, was signed by Respondent. The agreement between the Association and the Union effective between April 1, 1991, and March 31, 1994, was received as General Counsel's Exhibit 8.[4] And the agreement between the Association and the Union from April 8, 1994, to March 31, 1997, was received as General Counsel's Exhibit 9.

James Dabbondanza, a business agent of the Union, testified that in the beginning of 1992 the Union realized that because of the economic climate it was necessary to offer a market recovery program, named the Target Margin Recovery Program, to its contractors; that for a contractor to participate in the program it had to have a current collective-bargaining contract with the Union and the contractor had to be current with its fringe reports; that it was a job-by-job program; that the contractor had to be bidding against a non-union contractor; and that Respondent participated in this program.[5]

Preston Thomas Harbin Jr. (Harbin), Respondent's president and owner, testified that Respondent filed for bankruptcy protection in February 1993.

By letter dated August 6, 1993, General Counsel's Exhibit 14, Respondent advised the Union as follows:

> Mr. John W. Lundak, Jr.
> Road Sprinkler Fitters
> Local Union No. 669
> 7050 Oakland Mills Road, Suite 200
> Columbia, Maryland 21046
>
> Dear Mr. Lundak:
>
> As you may know, Dominion Sprinkler Services, Inc. filed for Chapter 11 on February 10, 1993. This decision became necessary due to the weak construction market and our inability to compete in the bidding of the jobs available.
>
> Dominion Sprinkler Services, Inc. is a small company with a gross income under $1,000,000.00 a year and employs five to seven men. The majority of our work is tenant modification with the majority of our work ranging under $15,000.00
>
> Our main competitors are non-union contractors: Virginia Sprinkler, Chesapeake Sprinkler, United Sprinkler, Fairfax Sprinkler, Prestige Sprinkler, Nova Plumbing and Bob Gerber.
>
> In the past 16 months we have lost several jobs to these competitors. In each of the following cases we have come in 2nd in the bid. Church of Jesus Christ, Centreville, Va. on 7–14–93. Our bid was $72,775.00. Fairfax's was $65,500.00. ABC Equipment of Leesburg, Va. on 7–17–93. Our quote was $2,600.00. Nova Plumbing's was $2,100.00. This was a tenant modification of 27 new sprinklers.
>
> In January 1993 Dominion Sprinkler negotiated a tenant modification for O.S.C. Corporation in Sterling, Va. We had to negotiate against Bob Gerber Enterprises. Our unit prices for recessed sprinklers were $75.50 for a new sprinkler and $43.50 for a relocated sprinkler. This project was manned with 3 men plus myself for 3 months. To make this job profitable I worked 2 to 3 hours a day plus Saturdays & Sundays for a 40 hour week's pay. I can not do this on every project.
>
> These are just a few examples, of many, we have on our bid results. The prices are below prices used in 1985. We can not operate at the low profit margin of 4% or 5% on small jobs. If anything goes wrong your automatically at a loss.
>
> In order to survive and compete against the non union Contractor we need some relief on the labor cost on a full time basis not on a target basis.
>
> We are requesting that Local 669 allow Dominion Sprinkler to operate at the 80% target rate, $17.60 per hour, on a full time basis with no differential for night time mall work. We would hope to try this on a trial basis of 6 months to try to secure a larger percentage of work lost to open shops.
>
> Please take this under consideration and notify me of your decision at your earliest convenience.
>
> If you have any questions please do not hesitate to contact my office.

Dabbondanza testified that the Union did not agree to extend the targeting program to all of Respondent's jobs but rather each job is reviewed to determine if it is necessary to target a particular job. Harbin testified that Respondent's financial difficulties started in the early 1990s and that competition was the main cause; and that he was verbally advised that the Union would cooperate as much as possible. On rebuttal, Dabbondanza testified that he had never given any company blanket approval to be in the target recovery program for all of its jobs because this was not how the program was set up.

By notice dated October 18, 1993, General Counsel's Exhibit 15, the Union informed its signatory contractors as follows:

[4] Collectively, art. 19, 20, and 22 of the agreement require health and welfare and pension contributions. And art. 4 speaks to remitting union dues deducted from employee paychecks to the Union.

[5] There were seven copies of the ''CONTRACTOR REQUEST TARGETING FORM'' introduced as G.C. Exh. 10. All were submitted by Respondent to the Union in 1993. In each of the situations covered, the Union waived a specified percentage of the pay called for by the agreement. As evidenced by G.C. Exh. 11, Respondent was awarded contracts on each of these projects. Copies of the finalized target agreements for a total of four of the projects were received as G.C. Exhs. 12 and 13.

TO ALL LOCAL 669 SIGNATORY CONTRACTORS

Gentlemen:

As I outlined to you in my letter of July 19, 1993, targeting would continue as it had in the past until November 15, 1993, at which time the Mutual Cooperation Committee, as outlined in Article 2 of the current collective bargaining agreement, would address the issue.

Be advised that the Targeting Program will be extended and offered only to independent contractors who have signed and returned the Assent and Interim Agreement sent with my letter of October 15, 1993 and contractors currently represented by the NFSA for bargaining.

If you have any questions or there is any confusion on the targeting issue, please feel free to contact either myself, President Dean Garness, or your local Business Agent.

Sincerely,
John W. Lundak, Jr.
Business Manager, Local 669

Dabbondanza testified that Respondent did not agree to sign the involved assent and interim agreement and, therefore, the Union had to negotiate with Respondent on an individual basis.[6] Harbin testified that Respondent was not allowed to participate in targeting after October–November 1993; and that he did not sign the assent and interim agreement that was sent to him on October 15, 1993, with a letter to ''ALL INDEPENDENT CONTRACTORS'' General Counsel's Exhibit 91, because he believed that the Union was taking the position that Respondent should sign it or Respondent would not be able to compete with its fellow union contractors. On rebuttal Dabbondanza testified that in the involved area none of the other union contractors signed the assent and interim agreement at the pertinent time and, therefore, none of them participated in the target recovery program at that time either.

According to Dabbondanza's testimony, in November 1993, Respondent sent reports into the funds office regarding deducted union dues but moneys were not submitted with the reports. Dabbondanza testified that before this Respondent did remit union dues; and that in 1994 Respondent ceased making contributions to the pension, health and welfare, supplemental pension, apprenticeship training, and industry promotion funds. Harbin testified that Respondent did not make any payments to the union funds in 1994 (for 1994) and it did not make any union dues remittances in 1994 to the Union or to the funds.

[6] An example of an agreement between the Union and an individual contractor was introduced as G.C. Exh. 16. And an example of a situation when the Union and an individual contractor modified the terms of the national agreement with an addendum was introduced as G.C. Exh. 17. On cross-examination Dabbondanza conceded that there are no individual contracts with contractors in the Washington metropolitan area. And on redirect Dabbondanza testified that he has never been advised by the business manager that Dabbondanza was prohibited from entering into independent contracts different from the national agreement.

General Counsel's Exhibit 77 covers a proposal dated ''11/24/93'' for a GSA/IRS job at Main Street, Fairfax, Virginia and a record of inspection dated ''8/17/94.'' Harbin testified that Louis Colquitt and Harbin believed James Clark worked this job; that as demonstrated by General Counsel's Exhibit 69 Colquitt previously worked for Respondent in 1991 and was laid off for lack of work; and that Colquitt was rehired by Respondent.

John Egar, who is the controller of the National Automatic Sprinkler Industry Fringe Benefit Funds, sponsored contractor remittance reports, General Counsel's Exhibit 29, which indicated who was working for Respondent, payments due to the various trust funds (i.e., welfare, education, and pension), and also the local union work assessments (union dues). The last report included in the packet is for February 1994. The reports show that there were no payments made by Respondent to the funds in December 1993 and in January and February 1994. Egar also sponsored the fund office's contractor confirmation monies reports for 1994 and 1993, General Counsel's Exhibits 30 and 31, respectively.[7]

General Counsel's Exhibit 75 covers a proposal dated ''2/22/94'' for Rosenbluth Travel and an inspection dated ''5/12/94.'' Harbin testified that the latter date was the date that the completed job was inspected; and that Stonebreaker and Colquitt worked this job.

General Counsel's Exhibit 84 is a proposal dated February 23, 1994, to Sunny Brook Development Corporation for a job on Sudley Road, and a proposal dated June 24, 1994, for a golf pro shack. Harbin testified that the job was worked at different times by Stonebreaker, Colquitt, Patrick McFarland, and Clark.

General Counsel's Exhibit 79 covers a proposal dated ''3/10/94'' for Peat Marwick and four partial releases of lien with the last one dated August 25, 1994. Harbin testified that this was a job that Respondent did; that the job was worked by Colquitt and two other employees who were discharged for cause; and that he finished the adjustments on the job.

Beginning March 11, 1994, Downey, who was a member of the Union, contacted Respondent seeking employment. General Counsel's Exhibits 44 and 45 are copies of his handwritten notes of the times that he telephoned Respondent, among other employers. During the following 9 months, Downey telephoned Respondent about 25 times seeking employment.[8] He testified that sometimes no one answered the

[7] Additionally, he sponsored a number of letters and fund documents that speak to nonpayment at various times by Respondent, G.C. Exh. 32. And finally, he sponsored an undated memorandum from the administrator of the trust fund, Michael Jacobson, in which he indicates that Scott Stonebreaker said that Respondent intends to go nonunion and he refers to two recent jobs, namely, Crown Books at Annapolis Junction and Linens N Things at Springfield Mall, Virginia. It is noted that G.C. Exh. 11 includes a letter dated October 4, 1993, from Harbin to Dabbondanza indicating that Respondent had been awarded the contract for Crown Books at Annapolis Festival. Stonebreaker testified that he did speak to Jacobson; and that everything in the Jacobson memorandum is correct, except that he was not sure about the notation that the Company intends to go nonunion or about the notation regarding the bank accounts.

[8] More specifically, in 1994 he telephoned Respondent on March 11, 22, and 31; April 13, 19, 20, 25, and 26; June 28; July 5, 19, and 29; August 2, 3, 8 (specifically indicated that not in), 9, 11, 23, and 29; September 14, 29, and 30; October 3, 5, 7, 10, and 28; and November 2.

telephone; that in March 1994, he met Stonebreaker at the Springfield Mall in Virginia and Stonebreaker told him that Respondent needed some people; that he told Stonebreaker that he, Downey, had worked at named companies; and that the named companies were union contractors. On cross-examination Downey testified that he was never asked if he was a member of the Union when he telephoned Respondent looking for a job; and that he started working for Grinnell in November 1994, and since that Company had just gone nonunion he obtained a withdrawal card from the Union.[9] Harbin testified that when Downey telephoned Respondent before June 1995, Respondent did not have any work at the time.

By notice dated March 22, 1994, General Counsel's Exhibit 18, the Union notified its members as follows:

SPECIAL STRIKE NOTICE TO ALL
LOCAL 669 MEMBERS

> Although we are engaged in separate negotiations with the National Fire Sprinkler Association, on behalf of the contractors it represents, and also with Grinnell Fire Protection Systems, neither negotiations are any way near a successful completion. We negotiated with Grinnell last week and will negotiate with the NFSA at the end of the month in New York City.
>
> Local 669 and its Negotiating Committee will make all efforts to reach fair and equitable settlements with all concerned. In order to get the latest word on contract negotiations, you are directed to call Local 669's toll free number (1–800–638–0997). That number will have up-to-date information 24 hours a day *beginning at the close of business March 29, 1994, 4:30 p.m. EST*. You may also contact your Business Agent via his answering service for updated information as available.
>
> I have enclosed with this letter a list of contractors who are bound to the 1994 contract. They will *NOT BE STRUCK* April 1, 1994 regardless of negotiations. These contractors have indicated that they intend to continue doing business in our industry with an Agreement with this Union. Unless you are specifically advised otherwise via your Agent, by telephone, through the National Office toll-free number, or by written notice from the National Office, be advised that *WE ARE STRUCK* against all contractors other than those on the enclosed list effective April 1, 1994.
>
> If we are able to reach agreement with the NFSA or any individual contractor(s), you will be notified if you are working on a job covered by an International or Building Trades Project Agreement that contains ''No Strike'' language, we will not strike the job. If you are unsure about a Project Agreement, check with your Business Agent.
>
> It remains our hope and our objective to reach an agreement with the NFSA and all independent contractors without a strike. You will be notified if we settle. We must have a fair and equitable agreement with all of our signatory contractors. Together we will succeed.

Respondent was not included on the enclosed list. Dabbondanza testified that he never contacted Respondent and threaten to strike it; that the Union did not strike Respondent; and that Respondent's president, Harbin, was a member of the Union at the time and he most likely received a copy of the notice. Harbin testified that he was still a union member at this time; that he received this notice; that he was never notified that Respondent was not going to be struck; that he believed that Respondent was going to be struck and based on this belief he made preparations to secure job material and equipment and to start bringing the vehicles back into the office; and that prior to this notice he had not received any notice from the Union offering to bargain with Respondent. On cross-examination, Harbin testified that he never received a telephone call from anyone in the Union indicating that Respondent would be struck. And on redirect he testified that he was never notified that the strike was off. Stonebreaker testified that he received the notice; that if he had received notice from the Local, the employees would have gone on strike; and that he thought that he would have received a letter saying to strike before there was a strike. Also Stonebreaker testified that the only jobsite that he pulled anything off of was the Church of the Latter-Day Saints and there part of the problem was that the general contractor was not making payments to Respondent. On rebuttal, Dabbondanza testified that members know that the notice does not necessarily mean that there is a strike coming and they know that they are supposed to ask their union representative.

General Counsel's Exhibit 74 covers a proposal dated ''3/28/94'' for Sully Construction for a volunteer fire department, partial waivers of lien and a form signed by Harbin on November 28, 1994, indicating that the work was 100-percent complete. Harbin testified that the job was actually done for Oliveria and that the project was completed; and that he, Stonebreaker, Robert Acheson, and Clark worked this job.

By letter dated March 30, 1994, General Counsel's Exhibit 33, the funds' attorney advised the general contractor of the Church of Latter-Day Saints job in Germantown Maryland as follows:

> Fox Seko, Inc.
> Spring Park Place Suite #1500
> Herdon, VA 22070
>
> Re: Dominion Sprinkler, Chantilly, VA
>
> Dear Sir/Madam:
>
> This firm is a legal counsel for the National Automatic Sprinkler Industry Employee Benefit Funds (''NASI Funds''). Pursuant to the terms of a Collective Bargaining Agreement between Dominion Sprinkler and Road Sprinkler Fitters Local Union 669, U.A. (''Local 669''), Dominion Sprinkler is obligated to contribute certain sums of money for each hour worked by employees of Dominion covered by the Collective Bargaining Agreement. Dominion has failed to submit its reports and contributions to the NASI Funds for work performed on the Church of Latter-Day Saints job at Germantown, Maryland, during the months of September 1993 through the present.

[9] Dabbondanza pointed out that an honorary withdrawal card is not the same as resigning and that union charges could have been brought against Downey for working for a nonunion company.

> We are currently investigating the possibility of filing a lien on this job. In the interim, any steps which you may be able to take to rectify this situation will be appreciated.
>
> If you have any questions, please contact either myself or the firm's paralegal, Teresa Klakamp.
>
> Sincerely,
> Charles W. Gilligan

A similar letter was also sent to West Port Corporation regarding the Orbital Sciences Corp. job at Sterling, Virginia, General Counsel's Exhibit 34.

Harbin testified that prior to April 1, 1994, Respondent failed to remit certain funds to the union pension fund because the money just was not there because Respondent was in bankruptcy; that since it filed for bankruptcy there have been times when Respondent is not current in its obligation to the Internal Revenue Service (IRS); that Respondent was not out to break the Union; that if the Union was willing to negotiate with it, Respondent would have been willing to enter into an ''agreeable contract'' with the Union; that the general contractor on the Church of the Latter-Day Saints job wanted Respondent to get a bond for the job and when it did not because, according to Harbin, it was in bankruptcy, the general contractor ceased paying Respondent's invoices because of the threat of a lien; that Respondent refused to perform any more work until payment was made; that the general contractor terminated Respondent; that he telephoned Egar and told him what was owed to Respondent on the job so that if Respondent was not going to get paid, at least some of its obligations would be paid; and that Respondent did not make any arrangements to have someone else complete the job.

By letter dated April 5, 1994, General Counsel's Exhibit 72, Fox Seko Construction, Inc. (Fox) which, as noted above, was the general contractor on the Latter-Day Saints Church job, advised Respondent as follows:

> Dear Mr. Harbin:
>
> I am in receipt of some correspondence with the legal representatives of the NASI Funds, indicating their desire to lien the Latter Day Saints Church—Seneca Ward. Please take care of your obligations. My obligation is to my client and I will not hesitate to protect him. Your contract does not permit me to sever or separate payments for your outstanding obligations. However, I call your attention to pages two and three paragraphs 11 and 18, respectively, of our Subcontract Agreement.
>
> Sincerely,
> FOX-SEKO CONSTRUCTION, INC.

General Counsel's Exhibit 76 covers a proposal dated ''4/5/94'' for a job at the Department of State. Harbin testified that the job was completed in either November or December 1994. He signed a form dated November 30, 1994, included in the exhibit that indicated the job was 100 percent completed. Further, Harbin testified that Stonebreaker, Acheson, Colquitt, McFarland, and Clark worked this job.

General Counsel's Exhibit 78 covers a proposal dated ''4/27/94'' to Crisak, Inc. for Sun Glass Express at Springfield Mall, Virginia, and a final release of lien dated November 8, 1994. Harbin testified that Acheson and Colquitt did this work.

The April 29, 1994, contractors' marketing data report, General Counsel's Exhibit 28, which is a reporting service, indicates that the sprinkler work at the Westfield Corporate Center, Department of Motor Vehicles in Virginia was being done by Respondent.

General Counsel's Exhibit 82 covers a proposal dated ''5/3/94'' for the Virginia Department of Taxation and an inspection form dated ''11/4/94.'' Harbin testified that Acheson, Colquitt, and Clark worked this job.

General Counsel's Exhibit 87 covers a proposal dated May 3, 1994, for Cambridge Company on the record management Main Street job and an inspection form dated August 1994. Harbin testified that Colquitt did this job.

On May 5, 1994, Respondent's former employee Hall was laid off.[10] According to his daily calendar, General Counsel's Exhibit 43, and his testimony, he was working for Respondent's at the First Union Bank on Pennsylvania Avenue, Washington, D.C., at the time. Harbin told him of the layoff and also said that Respondent was waiting on blueprints and materials to start other jobs and he would be in touch. Hall testified that Harbin telephoned him every couple of days and said that Respondent was still waiting on the prints and materials. Hall testified that on May 3, 1994, he was working on the Church of the Latter-Day Saints job and that at that time the job was not finished, there were blueprints at the job and there were materials at the job.

By letter dated May 6, 1994, General Counsel's Exhibit 35, the Church of Latter-Day Saints, with a carbon copy going to Fox was advised by the attorney for the funds as follows:

> Church of Latter-Day Saints
> 18900 Kinsview Road
> Germantown, MD 20874
> Dominion Sprinkler
>
> Re: Church of Latter-Day Saints
> Germantown, Maryland
> National Automatic Sprinkler Industry
> Employee Benefit Funds
> (''NASI Funds'')
>
> NOTICE TO OWNER OR OWNER'S AGENT OF INTENTION TO CLAIM A LIEN
>
> You are hereby notified, pursuant to RP 9-104(b) of the Maryland Code, that the National Automatic Sprinkler Industry Welfare Fund, Local 669 U.A. Education Fund and National Automatic Sprinkler Industry Pension Fund (''the Funds''), and the Funds' Trustees, asserting claims of individual workers employed under the terms of a collective bargaining agreement with Sprinkler Fitters Local Union 669 hereby give notice of an intent to claim a lien on the property known as the Church of Latter-Day Saints at 18900 Kinsview Road, Germantown, Maryland, said claim in the amount of

[10] Harbin testified that, Hall was a journeyman fitter. Stonebreaker testified that Hall worked for Respondent a few years before 1994 and then he came back to work for Respondent again.

> $31,941.28. The basis for said lien is the provision of labor on the above-referenced project by members of Local 669 to Dominion Sprinkler during the months of December 1993 through April 1994. Pursuant to the terms of the collective bargaining agreement, Dominion Sprinkler was required to make contributions to the Pension, Welfare and Education Funds for each hour of worked performed by these employees. Dominion Sprinkler failed to make payment for any work performed during the above referenced months. The amount still owing is at least $31,941.28.
>
> I do solemnly declare and affirm under penalty of perjury that the contents of the foregoing notice are true to the best of the affront's knowledge, information and belief.
>
> Charles W. Gilligan
> O'DONOGHUE & O'DONOGHUE
> 4748 Wisconsin Avenue, N.W.
> Washington, D.C. 20016

Dabbondanza testified that on May 6, 1994, he received a telephone call from two of Respondent's employees who are union members, Martin and Hall; that Hall said that he had been laid off; that Martin said that he believed that he was going to be laid off soon and he and Hall had been pulled off a job where he believed that there was at least 3 or 4 weeks of work left; that Martin requested he go out and take a look at the jobsite; and that he made a note of this telephone conversation, General Counsel's Exhibit 25. On cross-examination, Dabbondanza testified that he was aware that the funds filed a lien against the Church of the Latter-Day Saints sometime in early May 1994.

A few days later Dabbondanza went to the jobsite of the Church of the Latter-Day Saints in Gaithersburg, Maryland. Dabbondanza testified that the sprinkler system was not yet completed, there was work to be done in installing sprinkler heads, branch lines, the valve room was not completed, there were adjustments to be made in the sprinkler heads themselves and to the ceiling tiles that were going in; and that he spoke to the job superintendent who told him that Respondent had picked up its toolbox and it was not on the job at the time but Respondent had work there yet to do.

According to Respondent's payroll records, General Counsel's Exhibit 71, Hux's last pay period with Respondent was May 7, 1994. Harbin testified that Hux previously worked for Respondent in 1992 when he was released, General Counsel's Exhibit 70; that Respondent rehired Hux; and that Hux voluntarily quit in 1994 and went to work for Grinnell Fire Protection (Grinnell).

Acheson testified that in May 1994 while working on a Bell Atlantic job he was told by Respondent's superintendent, Stonebreaker, that Acheson was laid off; that Stonebreaker said that if he wanted to he could stay on with Respondent but it would be nonunion; that Stonebreaker said that he thought that Acheson would receive the same pay; that Harbin kept him, Stonebreaker, and Colquitt, who was a union member; and that the Monday after he was laid off and returned the next day,[11] Harbin told him how much he was going to be paid,[12] and about health insurance[13] and a retirement plan he would be getting.[14] As demonstrated by the 1994 paycheck stubs introduced herein, General Counsel's Exhibit 36, Respondent deducted union dues from Acheson from January 1994, through May 17, 1994. Also during certain of the pay periods money was deducted for a supplemental pension fund.[15] Acheson testified that when he was laid off and then rehired the next day, the Respondent was working on jobs at the Church of the Latter-Day Saints, Bell Atlantic, and Main Street, Fairfax, Virginia.[16] Stonebreaker testified that he told Acheson that Respondent was not Union now, it did not have a contract, and it was up to Acheson whether or not he was going to work for Respondent.

By letter dated May 10, 1994, General Counsel's Exhibit 19, Dabbondanza advised Harbin as follows:

> Re: Negotiations for a New
> Collective Bargaining Agreement
>
> Dear Mr. Harbin:
>
> I have been assigned, by and on behalf of Local 669, to handle the independent negotiations for a new collective bargaining agreement between the parties. Toward that end and as soon as possible, please provide my office with alternative available dates within the next two to three weeks to meet. I will then contact you to attempt to select a mutually convenient date so that we may soon begin good faith negotiations for a new Agreement.
>
> I look forward to hearing from you.

Dabbondanza testified that a few days later he went to Respondent's place of business; that he spoke with Harbin who indicated that he received the May 10 letter; that they agreed to meet to negotiate a new agreement tentatively on May 22 or 23, 1994; and that they did not meet on either of these 2 days. Harbin testified that Respondent did not have any collective-bargaining sessions with the Union and it did not bargain with the Union for a new contract in 1994; that Dabbondanza said that he would pick a neutral site for negotiations but Dabbondanza did not recontract him about meet-

---

[11] He returned to a different job, namely Main Street, Fairfax, Virginia, which he worked with one other person, Colquitt. Acheson testified that in 1992 when a job was not done Harbin ''fired'' him and then rehired him 1 week later because Harbin needed people to work.

[12] While under the agreement he was making $23.50 an hour as a foreman, Harbin told him that he would receive $20 an hour.

[13] A copy of Acheson's Optima Choice health benefit card was received as G.C. Exh. 38. It indicates an effective date of June 15, 1994.

[14] Earlier Acheson had been notified that he was ineligible for certain benefits because the funds did not receive contributions, G.C. Exh. 37. Although some of the notifications indicate that he failed to work sufficient hours in the involved period, Acheson testified that he worked full time. Acheson testified that Respondent did not provide any pension benefits after he started working nonunion.

[15] Harbin conceded that Respondent withheld union dues and the SIS tax from the paychecks of Acheson, Martin, and Hall but Respondent did not remit these moneys to the funds.

[16] Acheson also sponsored a list of 12 jobs that Respondent did after it went nonunion, G.C. Exh. 39. He testified that at the time Hall and Martin were laid off Respondent did not hire anyone else; and that there was not too much work during the summer of 1994 for the three who still worked for Respondent to handle, and the overtime was ''nothing special.''

ing at a neutral site; that he did not believe that Respondent would be able to negotiate an individual contract with the Union but rather it would have been a question whether Respondent would take the industry-wide agreement or leave it; that Respondent could not economically assent to the industry-wide agreement; that he could not see the benefits of having any negotiations with the Union; and that he believed Respondent ''to have been at impasse'' with the Union because there has never been more than one contract. On cross-examination, Harbin conceded that Respondent had never sent the Union any proposals and the Union had sent the Respondent the assent and interim agreement. On redirect, he referred to his above-described August 6, 1993, letter to the Union. In answer to a question asked by Respondent's counsel, Stonebreaker testified that Harbin told him that if he, Harbin, could get a contract to his liking, he would sign it. On rebuttal, Dabbondanza testified that Harbin did not request a neutral site to negotiate a new collective-bargaining agreement; that he meets with contractors at a neutral site if the contractor requests it; and that when Harbin said that he did not believe that Dabbondanza had the authority to negotiate a contract Dabbondanza told Harbin that he was mistaken and that Dabbondanza would negotiate a new independent contract between Respondent and the Union.

Hall testified that on May 12, 1994, Harbin said that Respondent still did not have anything yet, that Respondent was going to have to lay him off, and that he would get his paycheck the next day.[17] On cross-examination, Hall testified that Harbin did not ask him if Hall wanted to come back as a nonunion employee; and that Harbin did not discuss becoming a nonunion employee at all.

On May 12 or 13, 1994, Saunders telephoned Respondent looking for work after he had been locked out at Grinnell. He testified as follows about the conversation.

> Q. Can you describe your first conversation with Dominion?
>
> A. Yes. Like I was saying, I called and a female secretary answered the phone, and I asked may I speak to Scotty Stonebreaker. She told me he no longer worked there. So after that I asked—well, she asked me do I have any experience. I said yes, I have experience with Local 669 since 1988; I've worked a numerous amount of contractors, and I was looking for a job.
>
> Well, she told me, ''We're no longer union.'' And when she told me that I said, ''Well, I'm unemployed. I'm just looking for a job. Do you have anything?'' She said, ''Well, just leave me your name and number and if anything comes up, we'll get back in contact with you.''
>
> Q. And during that conversation, did you mention any specific employers you had worked for?
>
> A. Yes, sir, I did. I mentioned Grinnell, 66—all the 669 contractors, from National North Start, Fire Guard, and so on and so forth.
>
> Q. At that time Grinnell was engaged in a labor dispute with the union?
>
> A. Yes, sir.

Saunders testified that in June 1992, he was laid off by Respondent as its job at the Sports Authority at the Springfield Mall in Virginia neared completion; that the two other sprinkler fitters on the job were also laid off; that his supervisor, Stonebreaker, told him at the time that the Respondent was running out of work and that Saunders should telephone in about 2 weeks when work was supposed to pick back up; that he was never told at the Sports Authority job that his work was unsatisfactory and he never received any complaints about his work on that job; that Respondent never telephoned him back after his May 12 or 13, 1994 telephone call; that he subsequently telephoned Respondent about 20 times looking for employment; that he stopped telephoning Respondent in the beginning of 1995 because he ''just got tired of calling''; and that he left his name and telephone number each time he telephoned Respondent. Harbin testified that he would not rehire Saunders because of ''his work ethic''; that Stonebreaker did not leave Respondent in 1994 or 1995 and that he was relying on Stonebreaker's assessment of Saunders. Stonebreaker testified that Saunders was not ''fast enough''; and that he did not have personal knowledge of Saunders' productivity but rather he was relying on what he was told by the foreman on the Sports Authority job. When asked by counsel for Respondent if he relayed his concerns about Saunders to Harbin, Stonebreaker testified, ''I would think so.''

General Counsel's Exhibit 83 covers a proposal dated May 13, 1994, to G & F for a job named TRW/EG&G on which Respondent waived a mechanics lien and release on July 7, 1994. Harbin testified that Stonebreaker and Colquitt did this job.

According to his W–4 General Counsel's Exhibit 59, on May 15 or 16 (second digit not clear), 1994, Respondent hired Pattana Malayavech. Harbin testified that this employee was hired to do sprinkler work; that he first shows up on Respondent's payroll for September 12, 1994; that he could install sprinkler pipes but he had to have supervision; and that he was hired for jobs that were not contemplated in May 1994. Subsequently Harbin testified that he thought the date of May 15 or 16 was a mistake and he would not have held this individual's W–4 from May until September.

By letter dated May 16, 1994, General Counsel's Exhibit 21, Respondent's attorney advised Dabbondanza as follows:

> Dear Mr. Dabbondanza:
>
> I am writing on behalf of my client, Dominion Sprinkler Services, Inc., in regard to the agreement between National Fire Sprinkler Association, Inc. and Road Sprinkler Fitters Local Union No. 669, U.A. dated April 1, 1991 (the ''the Agreement''). Please be advised that the Agreement terminated on April 1, 1994. Due to Dominion's financial difficulties, which have forced it to seek the protection of the bankruptcy court, Dominion will not be able to enter into a new agreement with your union. Dominion is now undertaking the necessary steps to become an open shop.
>
> If you have any questions or comments, please do not hesitate to contact me.
>
> Very truly yours,
> Eric A. Anderson

[17] Union dues and a tax for a union supplemental pension fund (SIS) were deducted from his paychecks, including the last one he received. G.C. Exh. 42.

On May 16, 1994, Dabbondanza received a telephone call from Martin who indicated that he had been laid off.

According to General Counsel's Exhibit 40, which is Martin's daily calendar on which he lists his jobs, and Martin's testimony, he was laid off on May 17, 1994.[18] Martin testified that when he was laid off he was working alone on the Church of the Latter-Day Saints job; that at the time the job was not finished yet[19] and there were materials on the jobsite to do the work and blueprints for the remaining work; and that Stonebreaker laid him off and when he asked Stonebreaker why he said, ''Well you know why.'' On cross-examination Martin testified that Stonebreaker did not say anything to him about wanting to be a nonunion employee when he laid him off. Stonebreaker testified that Martin did not ask why he was being laid off but rather asked why he was getting two checks to which Stonebreaker replied, ''[w]e're laying people off''; that there was not another job that Respondent could have put Martin on; and that as far as getting the work done during the summer of 1994, ''[w]e were pretty tight, but we got it done. But it was . . . lot of hard work.''

By letter dated May 20, 1994, General Counsel's Exhibit 20, Dabbondanza advised Harbin as follows:

> Re: Negotiations for a New Agreement
>
> Dear Mr. Harbin:
>
> This will confirm our recent communications relative to Local 669's request that your organization provide us with alternative available dates to commence good faith negotiations for a new collective bargaining agreement between the parties. You had advised me during my recent visit to your office that you would be available to meet on May 23 or May 24, 1994. I subsequently left a message with your office that we are available to meet with you on May 24, 1994 at 10:00 a.m. and suggested our national office located at 7050 Oakland Mills Road in Columbia, Maryland as a place to meet for bargaining. My message included a request that you contact me to verify this particular time and place.
>
> If I do not hear from you to the contrary before the close of business on Monday, May 23, 1994, then I will assume that your organization and Local 669 will meet to commence negotiations for a new agreement on May 24, at 10:00 a.m. at Local 669's national office in Columbia, Maryland.
>
> Your anticipated cooperation is appreciated and we look forward to meeting with you on Tuesday.

General Counsel's Exhibit 73 is a proposal dated May 20, 1994, to the Cambridge Company for the Angelina Bakery job. The exhibit also includes a contract and a copy of a check dated ''12/31/94.'' Harbin testified that he did this job by himself.

On May 22 and June 6, 1994, Harbin signed forms for the Virginia Employment Commission on which he indicated that the reason for the separation of Martin was lack of work, General Counsel's Exhibit 66.

By letter dated May 23, 1994, General Counsel's Exhibit 22, Harbin advised Dabbondanza as follows.

> Re: Negotiations for a New Agreement
>
> Dear Mr. Dabbondanza:
>
> I have been advised that there is no point in starting negotiations with 669. As Local 669 as [sic] stated in previous correspondence, there will not be more than one contract.
>
> Even though I choose no longer to be a 669 signatory, it is my intent to pay all contributions due. Please have Mr. Egar contact my office so a payment schedule can be worked out.
>
> Mr. Egar can contact my office at (703) 968–9668.

Dabbondanza testified that the second sentence in the body of the letter is not accurate in that he was prepared to commence negotiations for a contract separate and distinct from the national agreement; and that he was prepared to negotiate with Respondent as an independent contractor. Harbin testified that while the agreement expired March 31, 1994, it was his intent to make fund contributions through ''probably May 15th.'' On rebuttal, Edgar testified that he did have some conversations with Harbin about the possibility of settling the delinquent fund contributions; that settlement was never reached; and that the trustees have a policy that under the circumstances present here there would have to be a personal guarantee, interest and, since the payment schedule would extend beyond the expiration of the current contract, the contractor would have to sign the new collective-bargaining agreement or agree to be bound by the next collective-bargaining agreement. On surrebuttal, Harbin testified that Egar never asked him to personally guarantee the debt. Subsequently Egar testified that he recalled asking Harbin for a personal guarantee.

By letter dated May 25, 1994, General Counsel's Exhibit 23, Dabbondanza advised Harbin as follows:

> Re: Negotiations for a New Agreement
>
> Dear Mr. Harbin:
>
> As you are well aware, I was prepared to commence negotiations for a new collective bargaining agreement between your organization and Local 669 at the Union's national office in Columbia, Maryland yesterday morning, on May 24, 1994. As you are also well aware, it has been our intent and objective to negotiate independently with Dominion Sprinkler Services, Inc., with a good faith desire to both reach an agreement and to continue the parties' collective bargaining relationship.
>
> In view of, among other things, the apparent factual misrepresentation(s) contained in your May 23, 1994

[18] Martin began working for Respondent in February 1994. His paycheck stubs, G.C. Exh. 41, show that union dues and SIS were deducted from his paycheck through the period ending May 17, 1994.

[19] He estimated that there was enough work for two employees for 1 month. Hall corroborated this testimony. Hardin testified that maybe there was enough work left on the job for two men for 1-1/2 weeks. Michael Harpine, Respondent's designer and estimator, testified that four men could have finished the job in 2 weeks, going back to install the dry pendants that would have to be special ordered.

> letter, I once again restated our desire to meet and negotiate for a new agreement, by message with your office.
>
> Your failure to respond leaves us with no choice but to assume that you are refusing to bargain with Local 669. Please consider this letter Local 669's continuing demand that your organization bargain in good faith with Local 669 for a new collective bargaining agreement between the parties.

Dabbondanza testified that he never received a response to this letter; and that the parties never commenced bargaining over a new contract.

General Counsel's Exhibit 80 covers a proposal dated May 25, 1994, to EDC on Marshals in Sterling, Virginia. Harbin testified that the job was completed in August 1994. In a letter included in the exhibit Harbin indicates that the work was completed in July 1994. Harbin testified that he, Stonebreaker, Acheson, and McFarland worked this job.[20]

General Counsel's Exhibit 86 covers a job at Hot Sam's Pretzel Bakery at Springfield Mall, Virginia, with a completion date of June 12, 1994. Harbin testified that this job, which was inspected ''6/14/94,'' was done by Colquitt and Acheson.

On June 16, 1994, Respondent hired Robert Norton, General Counsel's Exhibit 57, to do sprinkler work. Harbin testified that Norton was hired as a helper for Colquitt and Norton was not doing the type of work that Respondent's former employees would have done.

On June 21, 1994, Respondent hired McFarland, General Counsel's Exhibit 58, to do sprinkler work. Harbin testified that McFarland was hired for a job that started earlier than anticipated; that the reason that McFarland was hired instead of telephoning one of the former employees was that McFarland was ''right there'' and he asked for the job;[21] and that with its financial difficulties, Respondent could not have kept one of the former employees on the payroll until this job came on line.

On or about June 23, 1994, Respondent hired Vincent Sturgill, General Counsel's Exhibit 53, as a helper for Acheson. Harbin testified that Sturgill was hired as a helper or apprentice and that was not the type of work that the former employees were doing;[22] and that Sturgill was not capable of being a fitter.

By letter dated June 23, 1994, General Counsel's Exhibit 72, Fox advised Respondent as follows.

> Since June 1, 1994, there has been no manpower from your company on the . . . [Seneca Latter-Day Saints] project.
>
> Failure to provide manpower is delaying the completion of finishes and the entire project.
>
> Unless this condition is corrected within 72 hours we will terminate your contract for default.

General Counsel's Exhibit 85 covers a job at the Park Plaza Building in Fairfax, Virginia, which was inspected ''6/24/94.'' Harbin testified that he and Stonebreaker did this job.

On June 28, 1994, Respondent hired Raymond Harlow, General Counsel's Exhibit 62, to do sprinkler work. Harbin testified that Harlow was hired as an apprentice.

By letter dated July 7, 1994, General Counsel's Exhibit 24, the Union's attorney advised Respondent's attorney as follows:

> Re: Dominion Sprinkler and Local 669
>
> Dear Mr. Anderson:
>
> The undersigned represents Road Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO (''Local 669'') and your recent letter to Business Agent Jim Dabbondanza has been referred to this office for a response.
>
> As the Union has repeatedly advised your client, Local 669 stands ready and willing to negotiate in good faith for a new collective bargaining agreement between the parties, and you may consider this letter another one of Local 669's continuing demands that Dominion Sprinkler Services, Inc. agree to meet and bargain with the Union. Further, Local 669 would object to any and all unlawful unilateral changes which may be made, in terms and conditions of employment for Dominion's bargaining unit employees. In an effort to ascertain if any such changes have already occurred, Local 669 requests that you or your client kindly forward to our attention, the following information within one week of today's date:
>
> 1. The names, addresses and telephone numbers of each and every employee of Dominion Sprinkler and/or P. Thomas Harbin, that has performed bargaining unit work during the period February 1, 1994 through and including the present.
>
> 2. For each individual named in response to item 1, please list the hours worked by each employee, and the

[20] Harpine testified that before Respondent became nonunion he did not factor in helpers in his bids because Respondent used only fitters; that for this job he factored in the use of a helper; and that it was his belief that if he did not factor in a helper Respondent would not have been awarded this or other specified jobs. On cross-examination, Harpine testified that he did not know, under the involved 1994–1997 collective-bargaining agreement, the ratio is of helpers or apprentices. Dabbondanza testified that under the 1991–1994 agreement if the contractor is unable to obtain union journeymen or apprentice fitters, it is required to telephone the Union and give it 72 hours to supply the manpower; that, therefore, a contractor that wishes to hire union fitters can easily do so; that there were a number of concessions in the 1994–1997 agreement, including reduced wage rates, a reduction in the supplemental pension contribution and the health and welfare rate, and a difference in the apprentice ratio, namely, from one apprentice for every two journeymen under the old contract to one apprentice for every one journeyman under the new contract; that he realizes that a contractor could not be competitive using only journeymen fitters and under the new contract the Union had made several concessions and has adjusted their apprenticeship program and instituted a training program to help the contractors be more competitive; and that Respondent could have bid helpers under the new contract.

[21] Harbin testified that Respondent does not maintain any system whereby former employees who are laid off at the end of a given job are given preference and recalled before new employees are hired.

[22] Harbin also testified that he did not have any helpers or apprentices when Respondent was working under the collective-bargaining agreement; and that there was no was way that the Union was going to give Respondent an apprentice.

wages and fringe benefits paid for all bargaining unit work performed.

3. A copy of any and all bankruptcy papers, including all petitions, schedules, and/or any other documents which relate to or refer to the alleged bankruptcy proceedings to which you refer in your letter.

Your attention to this matter is appreciated, and we look forward to responses to the above items no later than July 14, 1994.

Very truly yours,
Helene D. Lerner

Dabbondanza testified that the Union never received the information requested in the letter. Respondent's attorney stipulated that the information was never provided to the Union directly.

On July 15, 1994, Respondent hired Clark, General Counsel's Exhibit 63, to do sprinkler work. Harbin testified that Clark was hired as a helper.

By letter dated July 15, 1994, General Counsel's Exhibit 72, Respondent advised the Montgomery County Maryland fire marshal that it was no longer working on the Church of the Latter-Day Saints and it requested that its permit be canceled for that project.

On August 11, 1994, Respondent hired Mike Hess, General Counsel's Exhibit 60, to do sprinkler work. Harbin testified that Hess was hired as a helper for Acheson on jobs that were not contemplated in May 1994.

On September 27, 1994, Respondent placed an ad in the Washington Post, General Counsel's Exhibit 26, which reads as follows: ''SPRINKLER FITTERS/FIRE PROTECTION—Metro area. 703–968–9668.'' Dabbondanza testified that he telephoned the telephone number in the ad and the female who answered said, ''Dominion Fire Services.''[23] Harbin testified that he ran this ad because he had a couple of jobs coming up; that he needed ''low-grade'' apprentices; and that if he had hired more experienced employees he could not have competed for these jobs.

General Counsel's Exhibit 81 covers a job for Cambridge Company at Roland Clark Place, fifth floor, which was inspected on ''9–29–94.'' The proposal on this job is dated ''4–5–93.'' Harbin testified that Stonebreaker, Colquitt, and Clark worked this job and Harbin did the final adjustments and testing.

Dabbondanza testified that he followed one of Respondent's trucks to the State Department in Washington, D.C.; that at the jobsite he spoke to someone who identified himself as Stonebreaker; and that Stonebreaker indicated that he was a superintendent for Respondent and he and a nonunion fitter and helper, both of whom also introduced themselves, were working on a job. On cross-examination, Dabbondanza testified that Stonebreaker is a member of the Union; that sometime between May and September 1994 Respondent also had a job at the Cascade Shopping Center in Virginia that required two employees; and that he was at this jobsite in October 1994.

[23] Dabbondanza also sponsored an exhibit, G.C. Exh. 27, which is an undated list of signatory contractors. Respondent appears on the list. Its telephone number on the list is the same as the one that appears in the above-described ad.

On October 4, 1994, Respondent hired Sac Sangreung and James Leake to do sprinkler work, General Counsel's Exhibits 55 and 64, respectively. Harbin testified that Sangreung was hired as a beginning apprentice, he was not qualified as a fitter and the job that he was hired for was not contemplated in May 1994; and that Leake was hired as an apprentice helper for jobs that were not contemplated in May 1994.

By letter dated October 25, 1994, General Counsel's Exhibit 2, Respondent's counsel advised Counsel for General Counsel, among other things, that ''[d]ue to . . . [Respondent's] attempt to emerge from bankruptcy . . . [Respondent] cannot afford to pay union rates. Therefore, it is only hiring non-union fitters.''

By letter dated November 8, 1994, General Counsel's Exhibit 47, Harbin advised Respondent's attorney, as here pertinent, that Hall and Martin were laid off on May 5 and 17, 1994, respectively, due to lack of work, and Harbin called Grinnell and Northern Sprinkler and gave recommendations on their behalf; that Saunders ''would not be considered for reemployment due to the fact that his work and craftsmanship do not meet the standards of [Respondent or the Union]'' and that Downey was not hired by Respondent because of his ''previous affiliation and his 'too' does not meet the work standards of Dominion Sprinkler, Services, Inc. or the UA Local 669.'' Harbin testified that the statement about Downey in the letter is a mistake in that Downey never worked for the Respondent before he was hired in 1995; and that he had Downey confused with someone else.

On December 1, 1994, Respondent hired Thomas Goodman, General Counsel's Exhibit 61, to do sprinkler work. Harbin testified that Goodman was hired as an apprentice for jobs that were not contemplated in May 1994.

General Counsel's Exhibits 49 and 48 show that Respondent provided its employees with health insurance from Optimum Choice, Inc. for June 1994 to June 1995 and from June 1995 to June 1996, respectively. General Counsel's Exhibit 50 is Stonebreaker's application for this coverage.

On April 10, 1995, Respondent hired Kelly Pagliocchini, General Counsel's Exhibit 54, to do sprinkler work. Harbin testified that this employee was hired as an apprentice, he was not qualified as an fitter, and he was hired for a job that was not available in May 1994 when other employees left Respondent.

On or about May 24, 1995, Respondent hired Richard Tolley, General Counsel's Exhibit 52, to do sprinkler work. Harbin testified that Tolley was hired for a job that was not contemplated at the time the former employees left Respondent.

On May 26, 1995, Acheson was fired by Harbin for using a company vehicle on a personal matter and getting in an accident.[24]

On May 30, 1995, Respondent hired Allen Petitt, General Counsel's Exhibit 56, to do sprinkler work. Harbin testified

[24] At the time of the hearing herein Colquitt and Stonebreaker were still working for Respondent. The latter testified that he was a member of the Union and at the time of the hearing herein he was current with his dues; and that Acheson and Colquitt are both in the Union. Dabbondanza, testified that Stonebreaker and Colquitt are still members of the Union but that Acheson was expelled for failure to pay dues.

that Petitt was hired as an apprentice for a job that was not contemplated in May 1994.

Downey was hired as a sprinkler fitter by Respondent around June 5, 1995, General Counsel's Exhibit 51. Previously he worked for Grinnell until he was laid off on May 19, 1995. After he was laid off he sought employment with some companies, including Respondent. Harbin testified that he did not seek out Downey and hire him to undercut the General Counsel's case but rather Downey telephoned Respondent and ''there just happened to be a job available''; and that the job for which Downey was hired was not available when Hall and Martin were laid off. Harbin also testified that he did not ask Downey about his union status when he hired him but Downey did volunteer that he had resigned from the Union in November or December 1994.

Dabbondanza testified that the Union had no record on the individuals who Respondent hired in 1994 and 1995, as described above, except (1) Harlow, who was expelled from the Union January 1, 1989, (2) Malayavech, who is currently a member, and (3) Downey, who obtained a withdrawal card[25] from the Union in January 31, 1995.

Harbin testified that when the Bankruptcy Court confirms Respondent's payment plan it will remit the dues and money owed to the funds; and that it was not Respondent's intent to break the Union.

Analysis

It is alleged that since on or about January 20, 1994 (the 10(b) period from which the charge begins to run), Respondent, without the Union's consent, unlawfully failed to continue all the terms and conditions of the involved collective-bargaining agreement, which was effective by its terms to March 31, 1994, by failing (1) to pay fringe benefit contributions to the various trust funds, and (2) to remit dues to the Union, both of which are mandatory subjects for the purposes of collective bargaining; and that since on or about April 1, 1994, Respondent has continued, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct, to unlawfully fail to make fringe benefit contributions for unit employees in accordance with the terms of the involved collective-bargaining agreement, even though this relates to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining. On brief, the General Counsel contends that since Respondent was deducting from the employees' paychecks the dues and SIS, the conclusion is inescapable that Respondent was keeping the moneys it collected, which it should have been turning over; that alleged inability to pay is not a defense, especially in light of the fact that Respondent had sufficient moneys to provide unit employees with its alternative health plan, Optimum Choice, rather than making the payments to funds pursuant to Respondent's lawful obligations; that Respondent did not proffer any contract proposals or meet with the Union to bargain over a new contract and since there was no lawful impasse, its obligation to make funds contributions continued after the expiration of the involved contract on March 31, 1994; and that Respondent should remit all of the dues collected, make all of the funds contributions under its obligation that continues to the present, and be found liable for its failure under Section 8(a)(1) and (5) of the Act. I agree. In my opinion, for the reasons given by the General Counsel on brief, Respondent has violated the Act as set forth above.

It is also alleged that on or about May 10, 1994, the Union, by letter, requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit over the terms of a successor collective-bargaining agreement to the agreement that was effective to March 31, 1994; and that since on or about May 16, 1994, Respondent has unlawfully failed and refused to bargain with the Union. On brief, General Counsel contends that the law is clear that an employer has the duty to negotiate over a successor collective-bargaining agreement when proper notice has been given of the union's intent to modify or terminate the existing collective-bargaining agreement at its expiration, *Associated General Contractors*, 190 NLRB 1210 (1971); that the failure of the employer to meet and bargain over a new contract violates Section 8(a)(5) of the Act; that the parties had a long established 9(a) relationship between them, created when Respondent signed the above-described ''Acknowledgment of Representative Status of *Road Sprinkler Fitters Local Union No. 669*, U.A., AFL–CIO'' in 1987; that this same document was found to create such a binding 9(a) relationship in *Triple A Fire Protection*, 312 NLRB 1088 (1993); that Respondent had no reasonable basis to believe that there was a lack of majority support for the Union that would constitute a defense at the time of Respondent's failure to bargain and Respondent hardly has the clean hands necessary for this argument; that the Union properly sent its notice to negotiate the terms and conditions of a new collective-bargaining agreement more than 60 days before the end of the contract, fulfilling its requirements under Section 8(d) in that the Union enclosed a copy of the assent and interim agreement, in the event Respondent was amenable to being bound to the 1994–1997 agreement between the Union the multiemployer bargaining unit, as Respondent had agreed in the prior two cycles of negotiations; that the Union waited until after the successful negotiation of the national agreement before initiating contact with Respondent over a new contract because often independent contractors such as Respondent wish to review the contract to determine whether they wish to become a ''me-to'' signatory through the assent and interim agreement, or would rather negotiate an independent contract; that by unlawfully refusing to negotiate in 1994 Respondent continues to be bound by the terms and conditions of the expired 1991–1994 agreement; that Dabbondanza credibly testified that Respondent did not request to negotiate at a neutral site and the Union refused; that all of the arguments raised at the hearing by Respondent were mere pretext in an effort to conceal its fixed intent to become an ''open shop,'' which Respondent informed the Union of in its letter from Respondent counsel dated May 16, 1994; and that Respondent should be required to recognize the Union as the 9(a) representative, to bargain for a new contract, and to make whole those employees paid less than the contractual rate or who failed to receive the benefits required by the expired contract with full backpay and benefits. Again I agree with counsel for the General Counsel. Apparently Respondent, for its own reasons, concluded that it

[25] Dabbondanza explained that normally a withdrawal card is obtained by someone who is leaving the trade; and that it does not allow the member to work for a nonunion company.

would be more advantageous for it to be nonunion. It took those steps that it decided were necessary to bring this about notwithstanding its legal obligations. In so doing, Respondent, for the reasons given by the General Counsel on brief, violated the Act as alleged. Harbin's testimony that he requested a neutral bargaining site is not credited. This alleged request was not memorialized in writing at the time and, in my opinion, this allegation is nothing more than a fabricated post hoc rationalization for not at least attending the negotiating meetings.

It is also alleged that on or about July 7, 1994, the Union, by letter, requested that Respondent furnish the Union with the information described above; that the information requested by the Union is necessary for, and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit; and that the Respondent has failed and refused to furnish the Union with the information requested. On brief, the General Counsel contends that the information sought by the Union is relevant and necessary to the Union's function as the collective-bargaining representative, it is obviously relevant to the Union's ability to police Respondent's obligation to make fund contributions and dues-checkoff obligations that arose under the expired contract and continued thereafter, and the information as to wage rates was also relevant to Respondent's obligation to pay its unit employees wages in accordance with the expired contract; that the information requested is presumptively relevant in that it applies to unit employees, and the relevance has not been rebutted; that the request was not unduly burdensome; that it is beyond question that the Union was entitled to identifying information for unit employees; and that the remainder of the information sought is information that the Respondent routinely provided to the funds on a monthly basis for all of the previous years that it made its unlawful contributions, and hence the request was not unduly burdensome. As pointed out by the Board in *Westinghouse Electric Corp*., 239 NLRB 106, 107 (1978):

> It is well established that a labor organization obligated to represent employees in a bargaining unit with respect to their terms and conditions of employment, is entitled to such information from the employer as may be relevant and reasonably necessary to the proper execution of that obligation.[6] The right to such information exists not only for the purpose of negotiating a contract, but also for the purpose of negotiating a contract, but also for the purpose of administering a collective-bargaining agreement, The employer's obligation, in either instance, is predicated upon the need of the union for such information in order to provide intelligent representation of the employees.[7] The test of the union's need for such information is simply a showing of ''probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.''[8] The union need not demonstrate that the information sought is certainly relevant or clearly dispositive of the basic negotiating or arbitration issues between the parties. The fact that the information is of probable or potential relevance is sufficient to give rise to an obligation on the part of an employer to provide it.[9] The appropriate standard in determining the relevance of the information sought in aid of the bargaining agent's responsibility is a liberal discovery-type standard.[10]

[6] *Vertol Division, Boeing Co*., 182 NLRB 421 (1970); *NLRB v. Whitin Machine Works*, 217 F.2d 593 (4th Cir. 1954), cert. denied 349 U.S. 905 (1955).

[7] *F. W. Woolworth Co*., 109 NLRB 196, 197 (1954), enfd. 352 U.S. 398 (1956).

[8] *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967).

[9] *Brooklyn Union Gas Co*., 220 NLRB 189 (1975).

[10] *Acme Industrial Co*., supra.

In my opinion, the information sought herein is relevant to the Union's role as collective-bargaining representative. Respondent has not provided any valid reason for its refusal to turn over this information. Once again it has violated the Act as alleged.

Finally, it is alleged that beginning on or about April 14, 1994, Respondent, to discourage employees from engaging in union or concerted activities, (1) laid off and/or discharged Hall, Martin, and Hux, and (2) refused to consider Saunders and Downey for employment. With respect to the layoffs of Hall and Martin, on brief, the General Counsel contends that here Respondent was motivated by a desire to go nonunion and to escape its lawful obligations towards the funds; that to this end Respondent laid off Martin and Hall; that Respondent kept other employees whom it felt would place their loyalty to Respondent over their union membership, and who would not seek to work under the rules and requirements set forth in the expired or future contracts; that the evidence of animus is irrefutable in that when Martin was laid off and asked why, he was told by Stonebreaker, Respondent's superintendent and agent, that ''You know why''; that this was an obvious reference to the decision of Respondent to go eliminate the Union; that Acheson was laid off around the same time and returned to work the very next day after agreeing in the same conversation to work nonunion; that it is clear from Stonebreaker's conversation with Jacobson that Respondent had been intending to go nonunion for a while; that the layoffs of Hall and Martin were discriminatory layoffs in furtherance of Respondent's scheme; that the circumstances of the job at the Church of the Latter-Day Saints provides the evidence supporting the inference of discriminatory layoff in that there was a month's worth of work remaining for a two-man crew; that the decision is inescapable that the reason given by Respondent for terminating these two union fitters is pretextual; that Respondent's conduct must be viewed in its totality, and especially the timing, including the facts that Respondent had already made clear it intended to go nonunion, Respondent had already decided not to sign the national agreement, Respondent had received a notice of lien, Respondent had already received the Union's letter on May 10, 1994, seeking to begin bargaining, and counsel for Respondent's letter refusing to bargain was dated May 16, 1994, Harbin had also already engaged in unsuccessful negotiations with the fund over settling his past-due contributions, unsuccessful because of his unwillingness to enter into a new agreement, and Harbin had also decided to end his obligations to the fund effective shortly after the contract expiration; that, therefore, there can be little question of the antiunion animus behind the discharge of Hall and Martin; and that the amount of work that Respondent had at the time of the discriminatory discharges rebuts any remain-

ing defense. As Hux did not testify herein and, therefore, did not refute Harbin's testimony that Hux voluntarily quit to take another job, it is concluded that the General Counsel has not shown (aside from whether Harbin's testimony in this regard is credible) that Respondent violated the Act with respect to Hux leaving Respondent. On the other hand, in my opinion Respondent did violate the Act as alleged in laying off and/or discharging Hall and Martin. Perhaps to appreciate what happened to Hall and Martin it would be helpful to consider what happened to Acheson when he was contemporaneously told that he was laid off. Acheson was told that Respondent was closing up shop, he was being laid off, and he should go to the office and pick up two checks. Stonebreaker then told Acheson that he could stay with the Respondent that would be nonunion and that he probably would be paid the same. (He was not.) When he was told that he was laid off Acheson was working the Bell Atlantic job that was not finished at the time. He agreed to stay with Respondent and the very next day he was sent to work on a job at Main Street, Fairfax, which was a different job than the one he was working on the day before when he was laid off. Stonebreaker's explanation of why Acheson was told that he was laid off is ''because of lack of work at that church [the Latter-Day Saints Church]. That was our number one job at the time because we are a small company. But we needed help.'' In other words, it appears that Stonebreaker is taking the position that there was a lack of work but at the same time Respondent needed help. This position is inherently contradictory. If Malayavech did not start working for Respondent on May 15 or 16, 1994, then Respondent started hiring new employees a couple of weeks after it laid off Hall and Martin. The General Counsel has not demonstrated that Respondent's remaining employees worked an unusual amount of overtime up to the time that the new employees were hired to make up for the fact that Respondent no longer had the services of Hall and Martin. But the General Counsel has demonstrated that Respondent had a number of jobs on line or about to come on line at the time of the layoffs of Hall and Martin. Respondent did not deal with the specifics but rather was willing to rely on the generalized assertion that there was a lack of work. The problem I am faced with, however, is that I did not find Harbin to be a credible witness and Stonebreaker, as indicated above, apparently believes that there can be a lack of work justifying the layoff of an employee and at the same time a need by Respondent for that same employee's service. Neither of these two witnesses was credible. Additionally, contrary to the apparent intent of Harbin's testimony, in the past Respondent did rehire employees. In the circumstances I am faced with here, it is my opinion that the reason given by Respondent for Hall's and Martin's layoffs is a pretext. If this portion of the case were to be decided under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the United States Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), then I would conclude that the General Counsel has made a prima facie showing and that the Respondent had not come forward with a business justification warranting the lay offs of Hall and Martin or that it would have taken this action absent its discriminatory motive. Respondent violated the Act as alleged in this regard.

With respect to the alleged unlawful refusal to consider the applications of Saunders and Downey, General Counsel, on brief, contends that the Board requires that the General Counsel establish certain elements in a discriminatory refusal to hire case, namely, the alleged discriminatee applied, the employer refused to hire the candidate, the applicant was or might be expected to be a union supporter or sympathizer, the employer's knowledge or suspicion of such sympathy or support, the employer's animus against the Union, and the employer's refusal to hire the applicant because of such animus, *Atlanta Motor Lines*, 308 NLRB 909 (1992); *Big E's Foodland*, 242 NLRB 963, 968 (1979); that despite the repeated phone calls of Saunders and Downey over a number of months, they were not hired by Respondent even though at the same time Respondent was steadily hiring employees to do unit work and Respondent ran an advertisement for fitters in the Washington Post; that Downey was eventually hired only after he had taken a withdrawal card from the Union and had worked for a contractor that was no longer a union signatory, facts he made known to Respondent shortly before he was hired; that Downey began calling Respondent looking for work in March 1994, after being told by Stonebreaker at a jobsite that Respondent was looking for fitters; that Downey was consistently informed by Respondent that there was no work available; that each time Saunders telephoned Respondent he was told that there was no available work; that in fact there was abundant work available and Respondent was steadily hiring fitters during this period; that for the period beginning May 1994 until the date of the instant hearing on June 14, 1995, Respondent hired 13 individuals to do fitter work between May 15, 1994,[26] and May 30, 1995; that of all of the hirees, only one person was a member of the Union, with the remainder being neither nonmembers, expelled, or on withdrawal; that Harbin claimed that he did not know that the one member was so affiliated until it was mentioned by Dabbondanza during the trial; that Respondent managed to replace its unionized work force with a primarily nonunion workforce; that the inference should clearly be drawn that Respondent engaged in a discriminatorily hiring practice on the basis of union membership in violation of Section 8(a)(3); that Harbin's claim in correspondence to Respondent's counsel that Downey was not hired because of his ''previous affiliation'' constitutes an admission of Respondent's unlawful intent; that Respondent's claim that it refused to consider Saunders for reemployment because of poor work performance during Saunders' previous period of unemployment with Respondent does not pass muster under *Wright Line*, supra (1980), in that at no time was Saunders warned or suspended for poor performance when he worked for Respondent on the Sports Authority job, Saunders was given absolutely no indication that there was any type of issue, and the contractual provision for discharge for cause was not followed by Respondent in laying off Saunders; that there is nothing other than noncredible testimony on the part of Harbin or Stonebreaker to support Respondent's assertion; that when Saunders called Respondent he was not told that there was a problem with his work

[26] The General Counsel concedes that Harbin testified that this individual did not begin until September 12, 1994, the only hire with whom it disputes the dates contained on the W–2 forms as valid start dates.

performance but rather he was told that Respondent is nonunion; that Respondent's assertion that most of the individuals it hired were helpers, rather than journeymen fitters, which allowed it to bid jobs cheaper, is not a valid defense in that the Washington Post advertisement did not seek apprentices, it sought fitters, and Respondent did not hesitate to hire Downey as someone no longer a member of the Union, and who was willing to work below union scale; that Respondent was still bound to the expired contract, which required it to hire a certain ratio of helpers or apprentices to journeymen fitters and, therefore its hiring practice was itself a violation of the contract and cannot constitute a defense to an unfair labor practice charge; that under the new contract Respondent would have been able to hire the same number of apprentices through the Union that it hired without the Union; that Harbin's true interest was hiring employees to work at wages below the union scale and thereby escaping its contractual obligations; that while Harbin claims that he had no policy of rehiring former employees, the evidence taken in this proceeding indicates that Respondent, before the situation at hand arose, rehired former employees Acheson, Colquitt, Hux, and Hall, and yet once it decided to be nonunion, Respondent chose to not consider Hall, Martin, and Saunders, for employment after their layoff; that the only individuals whom Respondent chose to hire were those individuals who were willing to work nonunion, or those it could hire as helpers and apprentices below the union wage rates for journeymen fitters; and that such conduct shows a refusal to consider union members on the basis of their membership, conduct violative of Section 8(a)(3). In my opinion Respondent violated the Act as alleged in refusing to consider the application of Saunders and in refusing to consider the application of Downey until he indicated to Harbin that he, Downey, had taken a withdrawal card from the Union and had worked for another company that did not have an agreement with the Union. Regarding the former, Harbin testified that he was relying on what Stonebreaker told him about Saunders. The best, however, that Stonebreaker could do in support of this position, namely, that he told Harbin about Saunders, is ''I would think so.'' As noted above, I do not credit the testimony of either one of these witnesses. Harbin's above-described November 8, 1994, letter to Respondent's attorney demonstrates that Harbin was capable of indicating that the work of someone did not meet the standards of Respondent and the Union even when that individual, Downey, never, at the time, worked for Respondent. That letter also indicates, regarding Saunders, that ''his work and craftsmanship'' did not meet the standards of Respondent and the Union. As noted above, Harbin testified that his only way of knowing anything about Saunders' performance was from what Stonebreaker told him. Yet, Stonebreaker specifically testified only about Saunders' productivity and then he was allegedly relying, not on his personal knowledge, but rather on what he assertedly was told by the foreman on the job, which individual did not testify herein. As pointed out by General Counsel, Saunders was not told of any shortcomings (regarding his production or craftsmanship) while he was working at the Sports Authority job or while he was telephoning Respondent looking for a job. Saunders was told that the Respondent was now nonunion. In my opinion, the justification Respondent advances for not hiring Saunders is a pretext. If the refusal to hire Saunders was to be resolved under *Wright Line*, supra, I would conclude that General Counsel has made a prima facie showing and the Respondent has not shown a business justification warranting the refusal to hire Saunders or that it would have taken this action absent its discriminatory motive. Regarding Downey, Harbin was unable, other than testifying that it was a mistake, to explain what he meant in his November 8, 1994, letter to Respondent's attorney when he gave Downey's ''affiliation'' as a reason for not hiring this individual. In these circumstances, perhaps General Counsel is correct in his contention that in an unguarded moment Harbin let slip his real reason for not hiring Downey, viz., that, at the time Downey was an active member of the Union. Not only is Harbin's testimony that before June 1995 when Downey telephoned, Respondent did not have any work not credited but such testimony can only be described as ludicrous in the light of the facts that during the period that Downey was telephoning Respondent, Harbin was hiring new employees and advertising in the Washington Post for sprinkler fitters. The reason advanced by Respondent for not hiring Downey before June 1995 is a pretext. If the refusal to hire Downey before June 1995 was to be resolved under *Wright Line*, supra, I would conclude that the General Counsel has made a prima facie showing and the Respondent has not shown a business justification warranting the refusal to hire Downey or that it would have taken this action absent its discriminatory motive. Respondent violated the Act as alleged in refusing to consider the applications of Saunders and Downey (before June 1995).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The employees of Respondent, as set forth in article 3 of the collective-bargaining agreement between Respondent and the Union effective from April 1, 1991, through March 31, 1994, General Counsel's Exhibit 8, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Respondent has violated Section 8(a)(5) and (1) of the Act by (1) failing to pay fringe benefit contributions to the various trust funds, (2) failing to remit dues to the Union, (3) failing and refusing to bargain with the Union, and (4) failing and refusing to furnish the Union with the information requested.

5. Respondent has violated Section 8(a)(1) and (3) of the Act by (1) laying off and/or discharging Hall and Martin and (2) by refusing to consider Saunders and Downey for employment because these four individuals were members of the Union and/or supporters of the Union.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain af-

firmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally suspending contributions to health, welfare, and pension plans covering employees in the appropriate bargaining unit and by failing to remit dues deducted, Respondent will be ordered to remit all payments it owes to fringe benefits funds, with interest, as specified in *Merryweather Optical Co*., 240 NLRB 1213 (1979), and to make whole the employees for any expenses they may have incurred as a result of the Respondent's failure to make such payments in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). The Respondent shall also make whole its employees for any loss of wages and benefits they may have suffered by reason of the Respondent's failure to pay contractually required wages and benefits in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). All payments to employees shall be made with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by failing and refusing to provide the Union with requested information Respondent will be ordered to bargain in good faith with the Union concerning wages, hours, and terms and conditions of employment and to provide information the Union requested.

Having found that Respondent violated Section 8(a)(1) and (3) of the Act by laying off David Hall and Harlan Martin, Respondent will be ordered to reinstate them with backpay from the date of their layoffs until the date the employees are reinstated to their same or substantially equivalent positions. Backpay shall be based on the earnings that the employees normally would have received during the applicable to period less any net interim earnings, and shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950).

Having found that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider Edward Saunders and Jack Downey for employment, Respondent will, to the extent it has not already, offer them positions as sprinkler fitters with backpay from the date they should have been hired absent Respondent's discriminatory motive, and make Edward Saunders and Jack Downey whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them from the date they applied for employment to the date that Respondent makes them a valid offer of employment. Backpay should be computed as a quarterly basis as prescribed in *F. W. Woolworth Co*., supra, and shall be reduced by net interim earnings.

All sums due under the terms of the recommended Order shall include interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Dominion Sprinkler Services, Inc., Chantilly, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith by unilaterally, and without prior notice to the Union and without negotiating to impasse changing the terms and conditions of employment, terminating health, welfare, and pension contributions on behalf of its involved employees and refusing to remit moneys deducted from employees.

(b) Refusing to bargain in good faith with the Union concerning the rates of pay, wages, hours, and working conditions of the employees of Respondent, as set forth in article 3 of the collective-bargaining agreement between Respondent and the union effective from April 1, 1991, through March 31, 1994, General Counsel's Exhibit 8.

(c) Refusing to bargain in good faith by failing, on request, to furnish information relevant and necessary to the Union's performance as exclusive representative of employees in the aforedescribed collective-bargaining unit.

(d) Laying off employees for discriminatory reasons.

(e) Refusing to hire applicants for discriminatory reasons.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, rescind the unilateral changes the Respondent made in the terms and conditions of employment of unit employees.

(b) Bargain in good faith with the Union concerning wages, hours, and terms and conditions of employment of employees in the aforedescribed appropriate unit.

(c) On request, furnish the Union the information sought in its letter of July 7, 1994.

(d) Make whole employees in the above unit for reduced wages, and benefits, with interest, as set forth in the remedy section of this decision.

(e) Reimburse the involved funds for unpaid contributions, with interest, and remit all dues deducted from employees paychecks.

(f) Reimburse employees in the above unit for any and all losses sustained by reason of any loss of eligibility for health and welfare benefits caused by the unilateral suspension of contributions, with interest.

(g) Reinstate and make whole David Hall and Harlan Martin laid off May 12 and 17, 1994, respectively for any loss of pay or other employment benefits suffered as a result of its unlawful conduct in the manner set forth in the remedy portion of this decision.

(h) Offer Edward Saunders and Jack Downey employment in positions for which they applied or if such positions, no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them or set forth in the remedy section of this decision.

(i) Preserve and, on request, make available to the Board and its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its facility in Chantilly, Virginia, copies of the attached notice marked ''Appendix B.''[28] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with the Road Sprinkler Fitters Local Union No. 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO concerning the rates of pay, wages, hours, and working conditions of the employees of Respondent, as set forth in article 3 of the collective-bargaining agreement between Respondent and the Union effective from April 1, 1991, through March 31, 1994.

WE WILL NOT refuse to bargain in good faith by declining, on request, to furnish information relevant and necessary to the Union's performance of its duties as exclusive representative of these employees.

WE WILL NOT, without bargaining in good faith with the Union, fail to pay employees in the above unit their established wage rates, and their benefits.

WE WILL NOT, without bargaining in good faith with the Union, terminate health and welfare contributions on behalf of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind the unlawful unilateral changes in terms and conditions of employment for unit employees.

WE WILL remit the dues collected from your paychecks.

WE WILL, on request, furnish the Union with the information sought in its letter of July 7, 1994.

WE WILL make whole unit employees, with interest, for all underpaid wages and benefits.

WE WILL reimburse the involved funds with interest, for all unpaid contributions.

WE WILL reimburse unit employees, with interest, for any and all losses sustained by reason of any loss of eligibility for health and welfare benefits caused by our unlawful refusal to bargain.

WE WILL offer David Hall and Harlan Martin reinstatement to the jobs of which they were unlawfully deprived or, if such a jobs no longer exists, substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of pay they may have suffered by reason of their discharge.

WE WILL offer Edward Saunders and Jack Downey employment in positions for which they applied, or if nonexistent, to substantially equivalent, and

WE WILL make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of this decision.

DOMINION SPRINKLER SERVICES, INC.